# BOOK REVIEWS

THE NATURE OF THE JUDICIAL PROCESS. By Benjamin N. Cardozo. New Haven: Yale University Press. 1921. Pp. 180.

What does a judge do when he decides a case? It would be interesting to collect the answers ranging from those furnished by primitive systems of law in which the judge was supposed to consult the gods to the ultra-modern, rather profane system described to me recently by a retrospective judge: "I make up my mind which way the case ought to be decided, and then I see if I can't get some legal ground to make it stick." Perhaps the widespread impression is the curiously erroneous one lampooned by Gnaeus Flavius (Kantorowitz). The judge is supposed to sit at a green baize table—the German equivalent in suggestion for our red tape—with nothing before him but a copy of the *Bürgerliches Gesetzbuch*. Personally, he has no equipment but a perfect thinking machine. The facts are presented to him and a mechanically perfect conclusion is automatically reached. Disregarding entirely the unattainability of this ideal degree of the elimination of the personal equation, one may well ask whether the ideal itself is worth striving to approximate.

Curiously enough, the literature in which judges themselves speak of the processes by which they reach their conclusions is very meager. Of introspective analysis by eminent judges there is practically none, unless it be found in those reminiscences that the Victorian lawyers were in the habit of making at one time. Nor am I aware of any objective psychological analysis of judicial opinions aimed directly at the question: through what mental process do judges reach their conclusions? There is, of course, a considerable controversial literature advocating more or less freedom in the judge in the interpretation of existing rules of law, and a polemical literature for and against judicial legislation, but here again we are dealing with ideals rather than actualities. Judge Cardozo's contribution, then, though his subject is as old as the law itself, seems to be a pioneer work.

The analysis of the judicial process around which the book is written divides the conscious from the subconscious. Consciously the judge resorts to logic (Lecture I, The Method of Philosophy), precedents, and a consideration of the end to be served (Lectures II and III, The Methods of History, Tradition and Sociology). The subconscious elements are dealt with in the last of the four lectures. The overlappings in this analysis are clearly recognized by the judge: the precedents contain their own logic; *stare decisis* has its function; so has the mere logical perfection of a system of rules. Yet this rough classification proves quite workable. In fact, many an opinion proceeds by discussing the matter "on principle" and then by "turning to the authorities," and winds up by a justification on the basis of "policy." Subconscious processes must, of course, be gathered from between lines of

an opinion, except in the case of a very few judges who are given to the habit of dipping into autobiography in their judicial pronouncements.

The relative importance of the several elements must, of course, differ not only in different judges but at different points in the career of a single judge and at any given time in the work of any judge with reference to different topics. An exact *quantitative* analysis of the kind that Judge Cardozo refers to, mentioning Mr. Wallas's book on "Human Nature in Politics," can hardly be made—at least in the present stage of our study. It is enough that Judge Cardozo gives us the *qualitative* analysis of the judicial process in Anglo-American law and makes it so wonderfully clear that within limits the judge is free to emphasize one or the other element. This he does not only on the basis of personal observation but with a rich scholarship which even his abundant humility (*cf.* page 13) cannot quite conceal. It is hard to recall a single instance in which any judge has made such rich use of our legal periodicals and of the works on legal philosophy and history which the Association of American Law Schools has caused to be translated. Judge Cardozo stands in the front rank of American judges today in the use he makes of such material in his judicial work. A typical instance may be found in the case of *De Cicco* v. *Schweizer* (1917), 221 N. Y. 31; 117 N. E. 807, in which the doctrine of *Shadwell* v. *Shadwell* was up for consideration. There the judge in a masterful way contrasted the views of Langdell, Ames, Williston, and Beale, and worked out substantial justice in his own way. Likewise, in this little book he gives more evidence perhaps than has ever been collected between the covers of a single volume heretofore that the judiciary has at length discovered the mine of thought and information in our legal periodicals.

Perhaps the most important contribution is the judge's recognition of the subconscious element. "Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge." This subject is by no means exhausted in this work, nor is it entirely satisfactory to view the personal equation as a "flaw" in our judicial system. (*Cf.* p. 177.) If that is once assumed, perhaps it is all that optimism can do to suggest: "The eccentricities of judges balance one another. * * * One is a formalist, another a latitudinarian; one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements." The subconscious element, however, exists, and must exist as a matter of fact. It is frankly recognized as a valuable factor in the development of civilization in other fields. (*Cf.* the discussion of *Kultur* on page 72.) Why not in law? True, careful analysis can help us isolate features of the subconscious mental process and raise them to consciousness, where they can be scientifically treated. Many years ago the asphalt chewer was an important individual in the preparation of asphalt for our streets. He did not know exactly what he did, but somehow or other by biting he was able

to tell whether the concoction had reached the proper stage of consistency. His place has since been taken by the machine which accurately tests the resistance of the substance and records the effect on a dial. And so the judge who talks of public morals or public policy is more or less unconsciously applying standards of ethics and sociology to a case before him. He is swayed by "intuitions of convenience or fitness too subtle to be formulated, too imponderable to be valued, too volatile to be localized or even fully apprehended." A better trained bar may some day call these elements by their scientific names. But in the meantime we must recognize among the functions of the judge this application of the civilization around him through the personal element to the problems of our law.

Judge Cardozo's little book is a valuable contribution to the study of the judicial process. Lawyers have, to be sure, always had to be cognizant of this process in a measure and to shape their arguments accordingly. Its scientific study, however, is just beginning, and with its development we may expect not only a new understanding of the process of legal evolution, but possibly a reformation that will eventually affect both the teaching and the practice of law.

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AMERICAN FOREIGN TRADE. By William F. Notz and Richard S. Harvey. Indianapolis: The Bobbs-Merrill Co. 1921. Pp. xv, 593.

This is a valuable book for those interested in the development of our foreign trade. Laymen wishing to know what is possible and probably immediately ahead in our foreign commerce will find here interesting and important information. Lawyers called on to advise and direct will find this a helpful manual as to what has been, and may be, done legally to meet varying situations likely to arise.

The five parts are: Introduction; Origin and Enforcement of Anti-Trust Laws; Coöperation, the Watchword in World Trade; The Webb-Pomerene Law; The Edge Act; Compacts in World Commerce; and an Appendix of Statutes and Forms.

A short history (eight pages) of our trade policy is given: the development of monopoly; origin and enforcement of anti-trust laws; a summary of the prosecutions under the Sherman Act of 1890,—only 18 in the first ten years of its existence, 192 in the next twenty years. The net legal results of these are: combinations by merger, complete ownership, or by holding companies for purposes of monopoly are unlawful; unfair methods of competition are evidence of a purpose to monopolize; but under the "rule of reason" mere size with unexercised power is not unlawful; *prosecution* in court is slow, uncertain, unsatisfactory in result, and disturbing to legitimate business.

These results led in 1914, not to the abandonment of the anti-trust policy, but to a different method of procedure: the creation of a Federal Trade Commission, with power, after investigation, "to *prevent* unfair methods of competition in commerce," and to order offenders "to cease and desist"